STATE OF MICHIGAN

IN THE SUPREME COURT

* *

ELLEN M. OSTROTH and
THANE OSTROTH,

Plaintiffs,

JENNIFER L. HUDOCK and
BRIAN D. HUDOCK,

Plaintiffs / Appellees,

v

WARREN REGENCY, G.P., L.L.C
and WARREN REGENCY LIMITED
PARTNERSHIP,

Defendants,

and

EDWARD SCHULAK, HOBBS &
BLACK, INC., Architects and Consultants,

Defendants / Appellants.

Supreme Court Docket No. 126859
C/O/A Docket No. 245934

L/C Civil Action No. 00-1912-CE

AMICUS CURIAE, INTEGRATED DESIGNS, INC'S AMICUS BRIEF

THOMAS M. KERANEN & ASSOCIATES, P.C.
By: Gary D. Quesada (P48268)
Attorney for Amicus Curiae
Integrated Designs, Inc.
6895 Telegraph Road
Bloomfield Hills, MI 48031

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I. STATEMENT IDENTIFYING ORDER APPEALED FROM

Amicus Curiae Integrated Designs, Inc. ("Integrated") supports Defendant - Appellant Edward Shulak, Hobbs & Black, Inc.'s Application for Leave to Appeal from the July 8, 2004 decision the Court of Appeals rendered in *Ostroth v Warren Regency, G.P, L.L.C , 263 Mich. App. 1 (2004)*.

II. STATEMENT IDENTIFYING ALLEGATIONS OF ERROR AND RELIEF SOUGHT

In *Witherspoon v Guilford, 203 Mich. App. 240; 511 N.W.2d 720 (1994)*, the Court of Appeals directly addressed the issue presented in the instant case: Where a claim arising from an improvement to real property against an architect, engineer, land surveyor or contractor is filed after the period of limitations set forth in MCL 600.5805 has expired, but before the six-year repose period set forth in MCL 600.5839 has expired, is the claim time-barred?

Witherspoon held that MCLA 600.5839 must be read in harmony with the limitations periods set out in MCLA 600.5805 in order to perform a complete Limitations / Repose analysis for claims as to Construction Contractors. The comprehensive reading of the entire statutory scheme in *Witherspoon* settled the law in the state of Michigan until the Court of Appeals rendered its subsequent ruling in *Ostroth*, supra, in early July of 2004.

In *Ostroth*, the Court of Appeals held that because MCLA 600.5839 was a statute of both limitation and repose, its provisions governed all claims against Contractors to the complete exclusion of MCLA 600.5805, or any other statutory provision. The foregoing is contrary to controlling authority of *Witherspoon*, and contrary to Legislative intent.

Such a significant departure from long standing Michigan precedent warrants review by this Court. For the reasons set forth hereinafter, Amicus Curiae Integrated urges this Court to reverse *Ostroth* and re-affirm *Witherspoon*. Amicus Curiae Integrated further urges the Court to overrule the case of *Traver Lakes v Douglas, 224 Mich. App. 335; 568 N.W.2d 847 (1997)*, to the extent that decision is inconsistent with *Witherspoon*.

III. STATEMENT OF QUESTIONS PRESENTED

1. DID THE APPEALS COURT COMMIT ERROR BY REFUSING TO FOLLOW WITHERSPOON?

Appeals Court said	"NO"
Plaintiff/Appellant Hudock says	"NO"
Defendant/Appellee, Edward Schulak, Hobbs & Black says	"YES"
Amicus Integrated says	"YES"

2. WHERE A CLAIM ARISING FROM AN IMPROVEMENT TO REAL PROPERTY AGAINST AN ARCHITECT, ENGINEER, LAND SURVEYOR OR CONTRACTOR IS FILED AFTER THE PERIOD OF LIMITATIONS SET FORTH IN MCL 600.5805 HAS EXPIRED, BUT BEFORE THE SIX-YEAR REPOSE PERIOD SET FORTH IN MCL 600.5839 HAS EXPIRED, IS THE CLAIM TIME-BARRED?

The Trial Court said	"YES"
Appeals Court said	"NO"
Plaintiff/Appellant Hudock says	"NO"
Defendant/Appellee, Edward Schulak, Hobbs & Black says	"YES"
Amicus Integrated says	"YES"

3. DOES MCL 600.5839(1) PRECLUDE APPLICATION OF THE STATUTES OF LIMITATION PRESCRIBED BY MCL 600.5805?

The Trial Court said	"NO"
Appeals Court said	"YES"
Plaintiff/Appellant Hudock says	"YES"
Defendant/Appellee, Edward Schulak, Hobbs & Black says	"NO"
Amicus Integrated says	"NO"

4. IF 600.5805 APPLIES, WHICH STATUTE OF LIMITATION, MCL 600.5805(6) OR MCL 600.5805(10), IS APPLICABLE TO THE CLAIMS ASSERTED AGAINST DEFENDANT EDWARD SCHULAK, HOBBS & BLACK, INC. IN THIS CASE?

The Trial Court said	"5805(6)"
Appeals Court said	N/A
Plaintiff/Appellant Hudock says	N/A
Defendant/Appellee, Edward Schulak, Hobbs & Black says	"5805(6)"
Amicus Integrated says	"5805(6)"

IV. STATEMENT OF INTEREST OF AMICUS CURIAE INTEGRATED DESIGNS, INC.

Integrated Designs, Inc., ("Integrated") is an Architect similarly situated to Appellant herein, Edward Schulak, Hobbs & Black, Inc. ("ESHB"). Integrated supports ESHB's Application for Leave to Appeal and the arguments contained therein.

Integrated is the Defendant in an architectural malpractice lawsuit, *Auto Owners v Integrated Designs, Inc.*, Alger County Circuit Court, File No. 03-4005-NZ. The facts in the instant case are similar to the facts in the case of *Auto Owners v Integrated Designs, Inc.*

In *Auto Owners v Integrated Designs, Inc.* the Trial Court dismissed the Plaintiff's claim against Integrated pursuant to MCL 600.5805(6) based on the authority of *Witherspoon v. Guilford, 203 Mich. App. 240; 511 N.W.2d 720 (1994)*. The Trial Court refused to follow *Ostroth v. Warren Regency, 263 Mich. App. 1; 687 NW2d 309 (2004)*. (See Trial Court's Order of Dismissal, at ***Exhibit 1***) The Plaintiff in *Auto Owners v Integrated Designs, Inc.* filed a timely claim of appeal, and that appeal is currently pending as Court of Appeals Docket No. 259488.

The legal questions presented in *Auto Owners v Integrated Designs, Inc.* are indistinguishable from those presented in the instant case. It therefore appears the decision in the instant case will control the disposition of *Auto Owners v Integrated Designs, Inc.* For the foregoing reasons, Integrated respectfully submits is Amicus Curiae Brief for this Court's consideration.

V. STANDARD OF REVIEW

This case presents questions requiring statutory interpretation as well as review of a grant or denial of Summary Disposition. This Court reviews both questions de novo. *Omelenchuk v City of Warren, 466 Mich. 524, 527; 647 N.W.2d 493 (2002)* (questions involving interpretation of statute); *American Federation of State, Co & Municipal Employees v Detroit, 468 Mich. 388, 398; 662 N.W.2d 695 (2003)* (questions involving the grant or denial of a motion for summary disposition).

VI. INTRODUCTION

The facts and issues presented in *Ostroth v. Warren Regency, 263 Mich. App. 1; 687 NW2d 309 (2004)* and *Auto Owners v Integrated Designs, Inc.*, Alger County Circuit Court, File No. 03-4005-NZ; Court of Appeals Docket No. 259488 are similar. In these cases, the Plaintiff's claim of architectural malpractice was filed after the period of limitations set forth in MCL 600.5805(6) had expired. Pursuant to the statutory interpretation of MCL 600.5805 and MCL 600.5839 set forth in *Witherspoon v. Guilford, 203 Mich. App. 240; 511 N.W.2d 720 (1994)* the Plaintiff's claims were held time-barred. The question brought before the Court is whether *Witherspoon* is the law in Michigan, or whether the re-interpretation of MCL 600.5839 presented in *Ostroth* should control.

Witherspoon and *Ostroth* are directly contradictory and cannot be reconciled. In *Auto Owners*, the trial court was faced with deciding which of these two Court of Appeals cases controlled, and correctly chose to follow *Witherspoon*, the case which was "first out." Pursuant to the rules of stare decisis, the trial court's decision is supported by proper authority and should be upheld. More importantly, and as will be discussed at length below, *Witherspoon* is far better reasoned than *Ostroth*. It is the strong legal analysis of *Witherspoon* that Amicus Integrated respectfully asks this Court to now endorse.

VII. STATEMENT OF FACTS

Auto Owners v. Integrated Designs

The undisputed substantive facts in *Auto Owners* are that the Plaintiff/Appellant filed its claim of architectural malpractice against the Defendant more than two years after the accrual of its claim, but less than six years after use, occupancy or acceptance of the improvement. Controlling precedent, as recognized by the trial court, is *Witherspoon v Guilford, 203 Mich. App. 240; 511 N.W.2d 720 (1994)*. The trial court granted summary disposition in favor of the architect, since the two-year period of limitations for malpractice, MCL 600.5805(6), had expired. The Plaintiff appealed the Trial Court's ruling, based on *Ostroth v. Warren Regency*. The *Auto Owners* appeal is currently pending.

Ostroth v. Warren Regency

The undisputed substantive facts in *Ostroth* are that the Plaintiff/Appellant filed its claim of architectural malpractice against the Defendant more than two years after the accrual of its claim, but less than six years after use, occupancy or acceptance of the improvement. Controlling precedent, as recognized by the trial court, is *Witherspoon v Guilford, 203 Mich. App. 240; 511 N.W.2d 720 (1994)*. The trial court granted summary disposition in favor of the architect, since the two-year period of limitations for malpractice, MCL 600.5805(6), had expired. The Court of Appeals reversed the trial court, rejecting *Witherspoon* and finding the statute of limitations for architects is six years pursuant to MCL 600.5839. The Defendant Architect applied for leave to this Court, and Integrated supports that application.

VIII. DISCUSSION OF QUESTION 1

1. DID THE APPEALS COURT IN *OSTROTH* COMMIT ERROR BY REFUSING TO FOLLOW WITHERSPOON?

Appeals Court said	**"NO"**
Plaintiff/Appellant Hudock says	**"NO"**
Defendant/Appellee, Edward Schulak, Hobbs & Black says	**"YES"**
Amicus Integrated says	**"YES"**

VIII.(A) LAW

MCR 7.215 states in pertinent part:

***

(C) Precedent of Opinions.

(2) A published opinion of the Court of Appeals has precedential effect under the rule of stare decisis. The filing of an application for leave to appeal to the Supreme Court or a Supreme Court order granting leave to appeal does not diminish the precedential effect of a published opinion of the Court of Appeals.

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(I) Resolution of Conflicts in Court of Appeals Decisions.

(1) Precedential Effect of Published Decisions. A panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals as provided in this rule.

VIII.(B) ARGUMENT

VIII.(B)(1) The "First Out" Rule Controls, and Witherspoon was "First Out"

MCR 7.215 (C) and (I) [formerly (J)] control the issue before the Court. In *Straman v. Lewis, 220 Mich. App. 448; 559 N.W.2d 405 (1997)*, the appellate court held that pursuant to MCR 7.215, a previously published opinion of the Court of Appeals "creates

binding precedent statewide," and is applicable to a trial court. *Straman at 451.* *Witherspoon* was decided after November 1, 1990, and has not been reversed or modified by the Supreme Court.[1] Pursuant to MCR 7.215(I), *Witherspoon* remains binding legal precedent in Michigan.

The resolution of Question 1 herein turns on whether *Witherspoon* was the "first case out" to determine the issue of how MCL 600.5805 and MCL 600.5839 should be interpreted relative to each other. *Witherspoon* was obviously decided ten years before *Ostroth*, and the fact sets are identical: i.e., a claim arising from an improvement to real property was filed after the limitations period in § 5805 had expired, but within the six year repose period identified in § 5839, following use, acceptance or occupancy of the improvement. The *Ostroth* court itself confirmed that *Witherspoon* previously decided the same issue:

> Citing *O'Brien*, supra, the *Witherspoon* Court stated that "the effect of [§ 5839] was one of both limitation and repose[.]" *Witherspoon*, supra at 245. *** the Court concluded that application of § 5805(8) could not be precluded where the claim was one of negligence against an architect, engineer, or contractor and was brought within six years after use, acceptance, or occupancy of an improvement ***." *Ostroth at 19 - 20.* [emphasis added]

The *Ostroth* Court recognized that "Generally, we would be bound to follow the precedent established by *Witherspoon" Ostroth at 16,* but the Court admitted that "We believe that *Witherspoon* was wrongly decided." *Ostroth at 13.*

MCR 7.215 prevents a court from contradicting a previously established rule of law, even if the sitting court disagrees with the prior decision. The Court Rules provide a

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[1] The *Witherspoon* Plaintiff applied for leave to appeal to the Michigan Supreme Court, but leave was denied, in *Witherspoon v. Guilford, 447 Mich. 979; 525 N.W.2d 451 (1994).*

mechanism for resolving such a disagreement, (see MCR 7.215(I)(2-7)) but nonetheless require a decision that is "first out" be followed. The foregoing is sound policy, but the Ostroth Court failed to comply as required. To reach its desired result, the Ostroth panel strung together a tortured series of misinterpretations of the previous case law, and concluded it was entitled to "skip over" Witherspoon, and reinterpret the statute. The Ostroth Court argues its authority to ignore Witherspoon is found in two cases that predate Witherspoon, being O'Brien v. Hazelet & Erdal, *410 Mich. 1; 299 N.W.2d 336 (1980)*; and Michigan Millers v. West Detroit Building Company, *196 Mich. App. 367; 494 N.W.2d 1 (1992)*.

VIII.(B)(2) Review of the Case Law

A review of *O'Brien* and *Michigan Millers* makes obvious that the questions presented in those cases are not the same question presented in Witherspoon and Ostroth, specifically, "where a claim of professional malpractice against an architect is filed after the period of limitations set forth in MCL 600.5805(6) has expired, and before the six-year repose period set forth in MCL 600.5839 has expired." A review of all the cases cited by the Ostroth panel is appropriate to illustrate the progression of the law, and to confirm that Witherspoon was the "first out" on the issue placed before the trial court. The cases relied upon by the Ostroth panel are summarized below:

Oole v. Oosting
82 Mich. App. 291; 266 N.W.2d 795 (1978)

In *Oole,* Plaintiffs' injuries occurred more than six years after occupancy. Plaintiffs sued the contractors, architects and engineers. The architects and engineers were

dismissed pursuant to the original version of MCL 600.5839, but the contractors' summary motion based on MCR 2.116(C)(7) was denied.

The contractors argued the statute should be interpreted to include contractors. The Court held that the legislature did not intend to include contractors. *Oole* at 295-296. The Plaintiffs argued that MCL 600.5839 violated the constitution, in depriving them of property without due process. The Court held that the Legislature has the power to abrogate causes of action, and therefore the statute was constitutional. *Oole* at 296-300.

O'Brien v. Hazelet & Erdal
410 Mich. 1; 299 N.W.2d 336 (1980)

A Supreme Court case, *O'Brien* is comprised of four consolidated cases, including *Oole*. In *O'Brien*, the plaintiffs in all four cases suffered injuries *more* than six years after use, occupancy or completion. The *O'Brien* Court specifically set out the questions for decision:

> We granted leave to appeal in these four cases to resolve whether *MCL 600.5839(1)*; MSA 27A.5839(1) "[violates] equal protection of the law or due process guarantees (a) in denying a cause of action to persons allegedly injured from negligent design or supervision of construction by state-licensed architects or professional engineers *completed more than six years before the injury*; and (b) by limiting the tort responsibility of licensed architects and professional engineers but not licensed contractors." *O'Brien at 12-13* [emphasis added]

The O'Brien Court analyzed the questions under both the due process and equal protection tests, and found MCL 600.5839(1) to be constitutional.

Cliffs Forest Products v. Al Disdero
144 Mich. App. 215; 375 N.W.2d 397 (1985)

In *Cliffs*, the plaintiff's injury occurred *more* than six years after completion. *Cliffs at 220.* Various parties in this multiparty case argued as follows: 1) MCL 600.5839 violates due process, *Cliffs at 219*; 2) MCL 600.5839 violates equal protection, *Cliffs at 220*; 3) MCL 600.5839 violates the title-object clause of the Constitution, *Cliffs at 220-221*; 4) MCL 600.5839 only applies to architects licensed by the State of Michigan, and not those licensed by other jurisdictions, *Cliffs at 222*; and 5) MCL 600.5839 cannot be applied where the transaction in issue occurred in Oregon and not Michigan. The *Cliffs* Court found no merit in any of the foregoing arguments.

Fennel v. Manyam & Associates
154 Mich. App. 644; 398 N.W.2d 481 (1986)

In *Fennell*, plaintiffs' injuries occurred over a prolonged period, within the period of six years after occupancy. However, the plaintiffs only discovered the alleged cause of the injuries *after* six years since occupancy had passed.

On appeal, the Plaintiffs argued that MCL 600.5839 violates due process, and that their claims should be treated as product liability claims, which are not subject to MCL 600.5839. The *Fennell* Court rejected these arguments, and specifically declined to find that the Legislature intended the operation of MCL 600.5839 to be dependent on the "discovery" of an injury.

Burrows v. Bidigare/Bublys
158 Mich. App. 175; 404 N.W.2d 650 (1987)

In *Burrows*, both the plaintiff's injuries and the filing of the lawsuit occurred within six years of occupancy. The *Burrows* Court followed the holding in *Marysville v. Pate, Hirn & Bogue, 154 Mich. App. 655; 397 NW2d 859 (1986)*, and found that because the claims were for deficiencies in the work itself brought by the owners (specifically, the glass curtain wall was leaking), and not third-party negligence claims, MCL 600.5839 was simply not applicable. *Burrows at 182.* The *Burrows* Court instead applied MCL 600.5807(8), the six-year statute of limitations for *contract* claims.

Judge T.M. Burns filed a dissenting opinion, arguing that relevant to the applicability of MCL 600.5839, there *should be no distinction* between "owner" claims and "third-party" claims. Justice Burns argued that the Legislature intended the statute apply to "any action for damages when defective building design is involved." *Burrows at 192.* The interaction between § 5839 and § 5805 was never addressed in *Burrows*.

Michigan Millers v. West Detroit Building Company
196 Mich. App. 367; 494 N.W.2d 1 (1992)

In *Michigan Millers*, the plaintiff's injuries occurred *more* than six years after use and occupancy. The Plaintiff argued that the previous case law, such as *Marysville* and *Burrows*, established that §600.5839 did not bar the building *owners* from bringing claims for the defective improvement itself. However, in 1988, the Legislature had amended MCL

600.5805, adding a paragraph (10)[2]. The Court *specifically set forth* the question for decision, referring to the *Marysville* line of cases:

> "The question presented in this case is whether the Legislature's enactment of § 5805(10) overrules this Court's interpretation of § 5839 in the cases mentioned above and requires the application of the limitation periods specified in § 5839(1) to all actions against a contractor based on an improvement to real property." *Michigan Millers at 372.*

The *Michigan Millers* Court explored the Legislative intent and found that § 5805(10) was intended to make § 5839(1) applicable to all claims for defective improvements, whether brought by owners or by third-parties. *Michigan Millers at 378.* Therefore, the holding in *Michigan Millers* confirms that § 5805(10) supercedes the holdings in *Marysville* and *Burrows*, and eliminates the distinction between an "owner" claim and a "third-party" claim, for purposes of § 5839(1).

Smith v. Quality Construction
200 Mich. App. 297; 503 N.W.2d 753 (1993)

In *Smith*, the plaintiff, a minor, suffered injuries *more* than six years after completion of the improvement. The claims were dismissed, and on appeal, the Plaintiff argued that the Court should apply the ten-year "gross negligence" period contained in § 5839, and alternatively, that the statute was tolled during the Plaintiff's infancy. Since the Plaintiff pled ordinary negligence, the Court found the six-year repose period was applicable, and that no tolling provision could apply, because no claim ever accrued. *Smith at 299-300.*

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[2] Due to several more amendments to MCL 600.5805, this same paragraph is now designated as (14).

Witherspoon v. Guilford
203 Mich. App. 240; 511 N.W.2d 720 (1994)

In *Witherspoon*, the Plaintiff's injuries occurred within a month of project acceptance. However, the Plaintiff failed to file suit against the Defendant contractor until *more* than three years after the injury occurred. Thus, for the *first time* since § 5839 was enacted, the Court addressed a case where although the subject injury occurred, and the lawsuit was filed, *within* six years from use, occupancy or acceptance, the suit was filed *after* the expiration of the general applicable statute of limitations for the claim, as found in § 5805. Unquestionably, *Witherspoon* was a case of first impression.

Relying on the analysis provided in *O'Brien* and *Michigan Millers*, the *Witherspoon* Court found that the Legislature did not intend to abrogate the effect of the general statutes of limitations by the enactment of § 5839, and that § 5805 and § 5839 can be and must be read harmoniously. *Witherspoon at 246-247.* Therefore, the Plaintiff's claim was subject to the three-year limitations period for ordinary negligence against a contractor, as prescribed in § 5805(8).

Traver Lakes v. Douglas
224 Mich. App. 335; 568 N.W.2d 847 (1997)

In *Traver*, the Plaintiff's injuries occurred within six years of use, occupancy or acceptance, but Plaintiff's lawsuit was filed against the Defendant contractors *more* than three years after the claim accrued. *Traver at 338-340.* Thus, for the second time, the Court of Appeals was presented with a fact set where although the subject injury occurred, and the lawsuit was filed, within six years from use, occupancy or acceptance, the suit was

filed *after* the expiration of the general applicable statute of limitations for the claim, as found in § 5805.

The *Traver* Court makes no mention of *Witherspoon* or *Michigan Millers*. The *Traver* Court cited *Smith* and *O'Brien*, and without further discussion of its reasoning, held that the plaintiff's claims against the contractors were afforded a six-year limitations period, and therefore were not time-barred.

Judge H. N. White dissented in *Traver*, arguing that the Court should not have reached the issue of whether § 5839 afforded the Plaintiffs a six-year period to file suit:

> "Under the circumstances, where plaintiff did not assert the applicability of the six-year period of limitation in the circuit court and does not assert its applicability on appeal, so that defendants have never addressed the applicability of the statute, I would not reach the question at this time. While this Court may choose to raise this issue of law on its own, it should give defendants an opportunity to respond, either by requesting additional briefing or remanding the matter to the circuit court." *Traver* at 349.

Thus, *Traver* was decided by the Court *without* the benefit of contested advocacy. While the result in *Traver* is consistent with *Ostroth*, also consistent is the lack of sound reasoning, or proper authority. *Traver* should be treated as the "wild branch" that it is[3].

Ostroth v. Warren Regency
263 Mich. App. 1; 687 NW2d 309 (2004)

In *Ostroth*, the record was unclear when use, occupancy or acceptance first occurred, however, the Court states that "there is no dispute that plaintiff's complaint was filed within six years" of use, occupancy or acceptance. *Ostroth at 25.* This finding by the

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[3] While *Traver* is oft-cited, it is cited for its other holdings such as its treatment of the doctrine of continuing wrongs, and not for its holding regarding MCL 600.5839. Only *Ostroth* has relied upon *Traver* in that regard.

Court would require that the injury also occurred within the six years. There also appears to be no dispute[4] that the Plaintiffs filed their malpractice complaint *later* than two years after the Defendant Architect's last date of service, *later* than six months after Plaintiffs discovered their injuries, but *within* six months of first becoming aware of the identity of the Defendant Architect.

Thus, for the third time, the Court was presented with a fact set where, although the subject injury occurred and the lawsuit was filed within six years from use, occupancy or acceptance, the suit was filed *after* the expiration of the general applicable statute of limitations for the claim, as found in § 5805, that being the two-year malpractice statute, commencing at the date of last service. The *Ostroth* Court held that the six-year period prescribed in § 5839 was the *only* limitations period that applied, and the claims were therefore timely.

VIII.(B)(3) Conclusion

Integrated Designs agrees that *O'Brien* and *Michigan Millers* were correctly decided. However, neither *O'Brien* and *Michigan Millers,* nor any of the cases cited by *Ostroth*, provide authority for "skipping" over *Witherspoon*. Despite the *Ostroth* Court's contortions, those cases, as described above, did not face the issue that was presented in *Witherspoon* or *Ostroth* or the instant cases, and thus they are simply not relevant to the specific issue presented by Question 1.

In order for the Plaintiff/Appellant to prevail, *Ostroth* must necessarily overrule *Witherspoon* on the same rule of law, a result which is clearly impermissible under MCR

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[4] At least for purposes of the parties arguments on appeal.

7.215. In *Auto Owners*, the trial court wisely and correctly declined to do so. Instead, the trial court took the only path available to it, which was to follow *Witherspoon*. Based upon all the foregoing, a Court of Appeals is likewise bound by *Witherspoon*, and therefore the *Ostroth* Court should have granted peremptory affirmation of the trial court's decision.

IX. DISCUSSION OF QUESTIONS 2 AND 3

WHERE A CLAIM ARISING FROM AN IMPROVEMENT TO REAL PROPERTY AGAINST AN ARCHITECT, ENGINEER, LAND SURVEYOR OR CONTRACTOR IS FILED AFTER THE PERIOD OF LIMITATIONS SET FORTH IN MCL 600.5805 HAS EXPIRED, BUT BEFORE THE SIX-YEAR REPOSE PERIOD SET FORTH IN MCL 600.5839 HAS EXPIRED, IS THE CLAIM TIME-BARRED?

The Trial Court said	**"YES"**
Appeals Court said	**"NO"**
Plaintiff/Appellant Hudock says	**"NO"**
Defendant/Appellee, Edward Schulak, Hobbs & Black says	**"YES"**
Amicus Integrated says	**"YES"**

In its Order dated May 12, 2005, this Court instructed the parties to address the following question:

DOES MCL 600.5839(1) PRECLUDE APPLICATION OF THE STATUTES OF LIMITATION PRESCRIBED BY MCL 600.5805?

The Trial Court said	**"NO"**
Appeals Court said	**"YES"**
Plaintiff/Appellant Hudock says	**"YES"**
Defendant/Appellee, Edward Schulak, Hobbs & Black says	**"NO"**
Amicus Integrated says	**"NO"**

Both the above questions are answered within the following discussion. The intended operation of the statute requires both MCL 600.5839 and MCL 600.5805 to be given effect, according to their terms. Prior to the expiration of the statute of repose

contained in MCL 600.5839, the applicable statute of limitation included in MCL 600.5805 prescribes the time period within which claims must be brought.

IX.(A) LAW

Statutory Law

The applicable statutory section for Plaintiff/Appellant's claim is MCL 600.5805, the statute applicable to traditional torts. *Hutala v. Travelers Insurance Company, 401 Mich. 118; 257 NW2d 640 (1977).* Michigan courts have specifically held that the general malpractice statute applies to architects. *Midland v. Helger, 157 Mich. App.736; 403 N.W.2d 218 (1987).*

The relevant limitations sections read in pertinent part :

MCL 600.5805. Injuries to persons or property; limitations;***

§ 5805. (1) A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section.
***
(6) Except as otherwise provided in this chapter, the period of limitations is 2 years for an action charging malpractice.
***
(14) The period of limitations for an action against a state licensed architect, professional engineer, land surveyor, or contractor based on an improvement to real property shall be as provided in section 5839.

Section 5839 reads in pertinent part:

MCL 600.5839. Limitation of actions against licensed architect, professional engineer, contractor, or licensed land surveyor; definitions; applicability of subsection (1).

Sec. 5839. (1) No person may maintain any action to recover damages for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real

> property, nor any action for contribution or indemnity for damages sustained as a result of such injury, against any state licensed architect or professional engineer performing or furnishing the design or supervision of construction of the improvement, or against any contractor making the improvement,, more than 6 years after the time of occupancy of the completed improvement, use, or acceptance of the improvement. ***

History of the Law

The enactment of MCL 600.5839 was a supplement to the existing statute of limitations. As explained in O'Brien *v.* Hazelet & Erdal, *410 Mich. 1; 299 N.W.2d 336 (1980)*, in the late 1950's and 1960's, the barrier of privity that once protected design professionals was being eroded:

> "The instant legislation was enacted in 1967 in response to then recent developments in the law of torts. The waning of the privity doctrine as a defense against suits by injured third parties [n13] and other changes in the law [n14] increased the likelihood that persons taking part in the design and construction of improvements to real property might be forced to defend against claims arising out of alleged defects in such improvements, perhaps many years after construction of the improvement was completed. The Legislature chose to limit the liability of architects and engineers in order to relieve them of the potential burden of defending claims brought long after completion of the improvement and thereby limit the impact of recent changes in the law upon the availability or cost of the services they provided." O'Brien *at 14.*

Pre-§ 5839, an architect might be sued for a defect in a building that had been completed decades before, perhaps long after important evidence had been destroyed. However, a plaintiff was entitled to sue once a latent defect was discovered, whenever such discovery occurred, as long as the claim was filed within the limitations period, which commenced at discovery. In 1986, the Legislature amended § 5839 to include construction contractors in its protections, as well.

When the Legislature enacted § 5839 in 1967, and later when it enacted several amendments, the Legislature did not express any intention to abrogate the existing statutes of limitations, specifically MCL 600.5805, which unquestionably applied. The question of how § 5839 and § 5805 might interact was not tested by the Courts until 1994, in *Witherspoon*, a case against a construction contractor[5].

IX.(B) ARGUMENT

Witherspoon Harmonizes § 5805 and § 5839

On a cursory reading, § 5805 and § 5839 might appear to be in conflict. They are not. The *Witherspoon* Court looked closely at the Legislative intent, and provided a well-reasoned harmonization between the two statutory sections to give effect to that intent:

> "It is clear then, that were an injury to arise from an alleged defect in an improvement more than six years after use or more than one year after discovery, § 5805(8) would not create for the would-be plaintiff an extended or additional period of viability notwithstanding § 5839.
>
> What is less clear is whether the six-year period applicable to ordinary negligence under § 5839 precludes application of § 5805(8) where the cause of action arises within six years after use or acceptance of the improvement. In other words, recognizing that § 5839 is a specific statute of limitations, which normally controls over a general statute of limitations, *Michigan Millers, supra at 374*, the question is whether § 5839, in tandem with § 5805(10), renders § 5805(8) inapplicable. We hold that it does not." *Witherspoon at 246.*

The *Witherspoon* court reasoned:

> "We understand § 5839, together with § 5805(10), to set forth an emphatic legislative intent to protect architects, engineers, and contractors from stale claims. However, because we must interpret the statute as a whole, reading each section in harmony with the rest of the statute, *Michigan Millers, supra,*

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[5] The applicable statute of limitations for negligence against contractors was (and is) three years. § 5805(8) (now § 5805(10)).

> we do not understand those provisions to expand the general three-year period of viability for injury claims under § 5805(8) to a six-year period insofar as the claims apply to those protected by § 5839. While it is possible, as plaintiff argues, that the Legislature intended to expand the period of liability as a "trade-off" for the protection afforded by the provision, we find no hint of such an intent in the provision itself or elsewhere. Moreover, our adoption of this interpretation would necessarily render § 5805(8) nugatory in such cases, an effect that this Court must avoid in construing statutes. *Id.* Because the Legislature in enacting these provisions did not clearly indicate that it intended through § 5839 to breathe additional life into claims that would otherwise have expired under § 5805(8), we choose not to read that intention into the statute." *Witherspoon at 247.*

The *Witherspoon* Court appreciated that both statute of limitations sections were intended to apply to construction defect cases. The two sections are both required to vindicate the purposes promoted by the Legislature. The general limitations scheme set forth in § 5805 promotes the purposes stated as follows:

> "By enacting a statute of limitations, the Legislature determines the reasonable period of time given to a plaintiff to pursue a claim. The policy reasons behind statutes of limitations include: the prompt recovery of damages, penalizing plaintiffs who are not industrious in pursuing claims, security against stale demands, relieving defendants' fear of litigation, prevention of fraudulent claims, and a remedy for general inconveniences resulting from delay. . ." *Gladych v. New Family Homes, 468 Mich. 594 at 600; 664 N.W.2d 705 (2003).*

The foregoing policies have been repeated in countless opinions, and have been well known long before 1967. However, the application of § 5805 to construction defect cases, particularly latent defect cases, was wholly inadequate to promote the above-stated policies, since a construction defect lawsuit that accrued upon discovery could still be brought long, long after most evidence was gone and memories had faded.

It was obvious that as long as the period of limitations commenced at the date of accrual, construction industry professionals would be exposed to an unreasonably long

period of exposure to liability. Therefore, the Legislature fashioned § 5839, a special statute of limitations / statute of repose, that is *not dependent on accrual*. Instead, construction professionals are protected from negligence claims at six years after use, occupancy or acceptance, irrespective of the date a claim accrues. Section 5839 provides *additional* protection, and does not substitute one type of protection to the exclusion of all other types. Note that § 5839 contains no accrual language. It cannot stand alone, and was not intended to. As an illustration, in cases where an improvement to property is *never* "used, occupied or accepted", § 5805 will be the only statute of limitation that is applicable.

The crux of *Witherspoon* is that the statutes do work together as intended. Taking another typical example, assume a negligence claim accrues on a construction site two years *before* use, occupancy or acceptance occurs. The policies behind statutes of limitation are served *only* if § 5805 applies, with the limitations period commencing *at the date of accrual*. What Legislative policy could possibly be served by extending the limitations period to six years *after* use, occupancy or acceptance? Do claimants enjoy a total of *eight years* to bring an ordinary negligence claim in such circumstances? Of course not. Section 5805 applies, in conformance with often-stated Legislative policy.

Section 5805 applies as soon as a claim accrues. If the § 5805 limitations period expires, the claim is thereafter barred. If a claim accrues after use, occupancy or acceptance, § 5805 also applies. Only when six years after use, occupancy or acceptance passes does § 5839 take effect, and § 5805 ceases to apply. If a claim accrues near the end of the six year period, the limitations period for that claim will be shortened, because

§ 5839 is a statute of limitations as well as a statute of repose, and it acts to demarcate the end of *any* applicable period of limitations.

The Problems with Ostroth

The essential flaw in *Ostroth* is that panel's foundational assumption that no matter what the circumstances, *a claim arising from an improvement to real property can never be subject to more than one statutory limitations section*. This assumption is mistaken, and has no supporting authority. In fact, the claim in this case is additionally subject to a third statutory limitations section, MCL 600.5838, the malpractice accrual section.

The *Ostroth* Court further assumed that by enactment of § 5839, the Legislature intended to *abrogate* § 5805, despite the *complete lack of any statutory language to that effect*, either in the original statute, or attached to any of the amendments the Legislature subsequently enacted. A review of the *Ostroth* opinion reveals there is no support for its assumptions, and that there is no authority for its holding. Below, some of *Ostroth's* more important mistakes are reviewed in the order they appear in the *Ostroth* opinion:

1) The *Ostroth* Court stated, as a result of the enactment of the 1986 amendments, which brought contractors under the protections of § 5839, that § 5805 was no longer applicable to contractors. *Ostroth at 13.* The Court does not provide any authority, or point to any statutory language in support, but simply makes the bald statement. One can read through *all* the cited authority and *all* of the *Ostroth* opinion without discovering *any* identified basis for the statement. Of course, none exists. The only authority on the issue is *Witherspoon*, which is contrary.

2) *Ostroth* relied most heavily upon *Michigan Millers* as its authority:

> "...the *Michigan Millers* Court's discussion of the Legislature's intent in enacting *§ 5805(10)* [now 5805(14)] and its effect on *§ 5839* is pivotal to our analysis of which statute of limitations is applicable in this case." *Ostroth at 13-14.*

As an initial proposition, the duty of the *Ostroth* Court *should* have been to discover and give effect to the Legislature's intent. Because the Court rigidly *assumed* only one statute section could ever be given effect, the panel limited its inquiry to "*which* statute (singular) applied." Because the Court precluded the possibility that both § 5839 and § 5805 could apply, there was never a chance the panel could identify the actual Legislative intent.

3) The issue for decision in *Michigan Millers* was whether § 5839 applied to both "owner" claims and "third-party" claims, and required a review of the legislative history behind the 1988 enactment of § 5805(10). *Ostroth* extensively quotes the only material available, the Senate Fiscal Agency Analysis. To the extent the Court gives weight to the Fiscal Analysis, it is entirely clear that only *one issue* was being addressed by enactment of § 5805(10), and that was the elimination the distinction between "owner" claims and "third-party" claims for purposes of § 5839.

Elimination of the distinction between "owner" claims and "third-party" claims for purposes of § 5839 was advocated by Judge Burns in *Burrows*. The Senate Analysis specifically states that the dissent from *Burrows* should prevail. *Ostroth at 15-16.*

What needs to be appreciated is that Judge Burns' dissent included opinions on at least *four* distinct and separate points of law. Another of Judge Burns' dissenting opinions was that the plaintiffs were afforded six years to file suit by § 5839. Notably, that issue was not necessary for decision and was not addressed by the *Burrows* majority. The

elimination of the distinction between "owner" claims and "third-party" claims for purposes of § 5839 was the *only* Burns position that was adopted by the Legislature in § 5805(10). A fair reading of the Senate Analysis can yield no other conclusion. A fair reading of *Michigan Millers* can yield no other conclusion. Yet, *Ostroth* presents the language from Burns' *Burrows* dissent which suggests the limitations period is six years, *as if* the Legislature adopted that position, as well. *Ostroth at 17.* There is no basis or authority for finding such an intent.

4) *Ostroth* criticizes *Witherspoon* for attempting to read all parts of the statutes in harmony. *Ostroth* suggests that since a "specific statute of limitations controls over a general statute of limitation" the remaining rules of statutory construction may simply be ignored. *Ostroth* cites *Michigan Millers* as its authority. *Ostroth at 20.*

A review of *Michigan Millers* reveals no support therein. The *Michigan Millers* Court listed a number of the rules of statutory construction, including that "Statutes *must* be interpreted as a whole....and *whenever possible*, the meaning of one section of a statute should be read in harmony with the rest of the statute."[emphasis added] *Michigan Millers at 373.* The *Ostroth* panel and Plaintiff/Appellant both discount the importance of reading statutes harmoniously, but other authority re-enforces the importance of the principle of harmonious construction. See for example, *Glazer v. Lamkin, 201 Mich. App. 432; 506 N.W.2d 570 (1993)*; *McDougall v. Schanz, 461 Mich. 15; 597 N.W.2d 148 (1999)*

5) In support of its analysis, *Ostroth* reasons that the additional repose protection for architects contained in § 5839 was gained at the cost of a "trade off", that

required the extension of the architect's period of limitations to a full six years, instead of two. *Ostroth* then quotes language from *O'Brien* as its authority. *Ostroth at 21.*

The "striking a balance" language quoted from *O'Brien* cannot be honestly construed to compel such a conclusion. The Legislature always "strikes a balance" when enacting laws that effect rights. On an objective review, it is obvious the "striking a balance" language referred to the Legislature's reluctance to *eliminate* liability for architects. The *O'Brien* language does not provide any evidence that a tripling of the limitations period was the intention of the Legislature in enacting the statute of repose.

6) *Ostroth* finds support in *Traver Lakes*. In fact, the *Ostroth* Court recognizes it is compelled to follow *Witherspoon* under the "first out" rule, and attempts to use *Traver* to excuse its violation. *Ostroth at 23 -24.* Even more obviously than *Ostroth, Traver* did not follow the rules of *stare decisis*. *Traver* is simply a "wild branch", provides no reasoned analysis, and should not be afforded any weight. This Court should follow the actual controlling authority, which is *Witherspoon*, the first case to address the issue now before this Court.

7) Finally, the *Ostroth* Court fails to recognize that the language of 600.5805(14) [formerly 600.5805(10)] has already been held by the Michigan Court of Appeals to create an ambiguity, and is not "clear":

> "...the language of the statute in question is not clear and unambiguous, because reasonable minds could differ concerning whether § 5805(10) [now 5805(14)] clearly specifies the applicable limitation period." *Michigan Millers v. West Detroit Building Company 196 Mich. App. 367 at 374; 494 N.W.2d 1 (1992).*

Statutory language being "not clear" leads to the requirement that the statute be

interpreted by the Court. *Witherspoon* properly analyzed the statute applying the rules of statutory construction. That analysis requires consideration of the language of the full statutory scheme, which *Witherspoon* provides. *Ostroth* has treated MCL 600.5839 as if its language is "clear", needing no interpretation. The *Ostroth* Court's approach therefore contradicts *Michigan Millers*, the very authority upon which *Ostroth* claims to rely.

IX.(C) Conclusion

Witherspoon's holding is hardly the result of a lack of "common sense", as argued by the *Ostroth* Court. Rather, unlike *Ostroth* and *Traver*, *Witherspoon* represents a fully reasoned approach to statutory interpretation, which not only harmonizes the various statutory sections, but clearly advances the known policies and intentions of the Legislature.

X. DISCUSSION OF QUESTION 4

In its Order dated May 12, 2005, this Court instructed the parties to address the following question:

> **IF 600.5805 APPLIES, WHICH STATUTE OF LIMITATION, MCL 600.5805(6) OR MCL 600.5805(10), IS APPLICABLE TO THE CLAIMS ASSERTED AGAINST DEFENDANT EDWARD SCHULAK, HOBBS & BLACK, INC. IN THIS CASE?**

The Trial Court said	**"5805(6)"**
Appeals Court said	**N/A**
Plaintiff/Appellant Hudock says	**N/A**
Defendant/Appellee, Edward Schulak, Hobbs & Black says	**"5805(6)"**
Amicus Integrated says	**"5805(6)"**

X(A). LAW

The relevant limitations section reads in pertinent part :

600.5805 Injuries to persons or property; limitations;

***

(1) A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section.

***

(6) Except as otherwise provided in this chapter, the period of limitations is 2 years for an action charging malpractice.

***

This Court inquires whether section (10) should apply. That section reads:

(10) The period of limitations is three years after the time of the death or injury for all other actions to recover damages for the death of a person, or for injury to a person or property.

X (B) ARGUMENT

The applicable statutory section for a claim against an Architect for negligence is MCL § 600.5805, the statute applicable to traditional torts. *Hutala v. Travelers Insurance Company, 401 Mich. 118; 257 NW2d 640 (1977).* Michigan courts have specifically held that the general malpractice statute applies to architects. *Midland v. Helger, 157 Mich. App.736; 403 N.W.2d 218 (1987).*

In defining malpractice for purposes of the Statute of Limitations, this Court has previously found that the Legislature intended that malpractice would be defined according to the common-law definition of the term, and thus only those groups traditionally liable for

malpractice would be benefitted by the two-year Statute of Limitations applicable to malpractice actions, where other groups would be subject to the three-year general negligence limitations period, *Sam v Balardo, 411 Mich 405, 308 N.W.2d 142 1981.* (where the Court concluded that Attorneys fell within the two -year limitations period for the same reasons as physicians). In *Sam*, the Court noted that the Revised Judicature Act does not define the term "malpractice" as used in § 5805. Accordingly, the Court held that "malpractice" within the meaning of § 5805 must refer only to those actions which were recognized at common law as constituting malpractice when the Judicature Act of 1915 and the Revised Judicature Act of 1961 were adopted. Thus, the inquiry turns to whether Architecture was a recognized profession prior to the enactment of the Revised Judicature Act of 1961.

Relative to Architects, the Michigan Supreme Court has long ago noted that "the responsibility of an Architect does not differ from that of a lawyer or physician.", *Bayne v Everham, 197 Mich 181, 199-200; 163 N.W. 1002 (1917).* That observation predates the Revised Judicature Act of 1961, and the underlying case predates the Judicature Act of 1915. Likewise, the Michigan Statute which first required Architects to be licensed (PA 1937, No 240 (CL 1948, § 338.551 et seq. [Stat Ann 1949 Cum Supp § 18.84 (1) *et seq.*]) predates the Revised Judicature Act of 1961 by nearly 25 years. In addition, causes of action for Architectural malpractice were recognized in Michigan as early as 1898, long before the Revised Judicature Act of 1961. *Harley v. Blodgett Engineering and Tool Co., 230 Mich 510; 202 N.W. 953 1925; Bayne v Everham, 197 Mich 181, 199-200; 163 N.W.1002 (1917), citing Chapel v. Clark, 117 Mich. 638; 76 N.W. 62 (1898)*

Thus, it is apparent as to Architects, they were required to answer for mis-performance of their duties at common law, long before either the Revised Judicature Act of 1961 or the Judicature Act of 1915 became law.

As there can be no credible question as to whether the Architectural profession was recognized at common law prior to the enactment of the Revised Judicature Act of 1961, the two-year limitation period set out at MCLA § 5805(6) controls over the general three year period set out at MCLA § 5805(10).

XI. OVERALL CONCLUSION AND REQUEST FOR RELIEF

Witherspoon is, and has been properly regarded as, the controlling authority in Michigan since 1994. While the Court of Appeals has published *Ostroth*, which criticizes *Witherspoon*, *Witherspoon* is still the controlling authority pursuant to MCR 7.215. This Court should follow *Witherspoon* and affirm the trial court's decision to dismiss the Plaintiff/Appellant's claims as untimely. Even absent the rule of *stare decisis*, the strength of reasoning in *Witherspoon* compels adherence to its authority.

Integrated Designs, Inc. respectfully requests affirmation of the trial court's dismissal of all Plaintiff/Appellant's claims, and that the decision in *Ostroth v. Warren Regency 263 Mich. App. 1; 687 NW2d 309 (2004)* be vacated.

Integrated further requests that to the extent tit is inconsistent with *Witherspoon*, the case of *Traver Lakes v. Douglas*, *224 Mich. App. 335; 568 N.W.2d 847 (1997)* also be overruled.

THOMAS M. KERANEN & ASSOCIATES, P.C.

Dated: July 7, 2005

BY: _____
Gary D. Quesada, (P48268)
THOMAS M. KERANEN & ASSOCIATES, P.C.
Attorneys for Defendant Integrated Designs, Inc.
6895 Telegraph Road
Bloomfield Hills, MI 48301-3138
(248) 647-9653 / FAX: (248) 647-9683